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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD.,

Petitioners,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT,

Respondent.

PETITION OF SOUTH CHICAGO COAL & DOCK COMPANY AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD. FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT J. FOLONIE,
HAYES McKINNEY,
Counsel for Petitioners.

THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, South Chicago Coal & Dock Company, an Illinois corporation, and London Guaranty & Accident Company, Ltd., respectfully pray the grant of a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, to review the judgment of that court entered May 11, 1939, rehearing overruled June 6, 1939; a transcript of

the record in the case, including the proceedings in said Circuit Court of Appeals is furnished herewith in accordance with the rules of this court.

Summary and Short Statement.

(1) The petitioners filed their bill of complaint in the United States District Court for the Northern District of Illinois, Eastern Division (under Sec. 21 Act of Mar. 4, 1927, Chap. 509, 44 Stat. 1436; p. 145 Pocket Suppl. Title 33 Sec. 921, U. S. C. A.), against the respondent for an injunction restraining the respondent, as Deputy Commissioner of United States Employees' Compensation Commission for the 10th Compensation District, from enforcing an order of compensation directing payments to be made to divers persons arising out of the death of John Schumann while a member of the crew as a deck hand of the vessel Koal Kraft upon the navigable waters of Calumet Harbor and River; to set aside such compensation order and for a finding that such compensation order should be held invalid upon the ground that said John Schumann, as a member of the crew of such vessel, was not within the compensation provisions of the Longshoremen's and Harbor Workers' Compensation Act.

(2) The facts of the situation showed that the vessel Koal Kraft was engaged in coaling other ships by receiving coal from the coal docks of the petitioner, South Chicago Coal & Dock Company, and transferring such coal by machinery to such other ships. (Tr. Dep. Com. p. 17—Dist. Ct. pp. 48, 57.) It was a fuel lightering business. (Tr. Dep. Com. p. 13—Dist. Ct. p. 48.) The Koal Kraft was 159 feet long, 37 feet 6 inches broad, had a draft of 10 feet or a little over, and was of 376 gross tons, 310 net tons. (Tr. Dep. Com. p. 14—Dist. Ct. pp. 47, 65.) The Koal Kraft was licensed to operate in waters between Illi-

nois and Indiana (Tr. p. 66) and operated in the Calumet River and Harbor and in the Indiana Harbor and River. (Tr. Dep. Com. p. 13—Dist. Ct. pp. 48, 66.) Its work was seasonal for about eight months of the year. (Tr. Dep. Com. p. 22.)

On October 31, 1937, when Schumann was lost off the vessel it was proceeding from its dock at 95th Street on the Calumet River (Tr. Dist. Ct. p. 53) to the steamer J. S. Ashley, moored at 103rd Street and the Calumet River. (Tr. Dist. Ct. p. 50.) The distance was in the neighborhood of a mile. (Tr. Dist. Ct. p. 53.) The course taken was thru and in a navigable stream. (Tr. Dist. Ct. p. 53.) On the day of Schumann's death he was on the ship when it left the coal dock at 95th Street. (Tr. Dep. Com. p. 37—Dist. Ct. pp. 50, 52, 55.) When the vessel reached 103rd Street, Schumann was missing. (Tr. Dist. Ct. p. 50.) The master of the ship next saw his body five days later after the coast guard had fished him out of the river at 95th Street. (Tr. Dist. Ct. p. 50.) He was then dead from drowning. (Tr. Dist Ct. p. 50.)

The Koal Kraft was inspected once a year by the steamboat inspectors of the United States Government. (Tr. Dep. Com. p. 14.) The inspectors issued a certificate of inspection saying how many men were required to operate that vessel and the certificate called for a total crew of six men. (Tr. Dep. Com. p. 41.) The ship under its certificate was not allowed to work continuously more than twelve hours out of every twenty-four hours. (Tr. Dep. Com. p. 36—Dist. Ct. p. 65.) [NOTE: The requirements contained in the certificate were testified to in the hearing before the Deputy Commissioner. The certificate itself was produced at the trial in the District Court.] The certificate so produced contained among other things, the following applicable to the vessel in question:

"May be operated not to exceed 12 hours out of

any 24 hours with 1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman." (Tr. Dist. Ct. p. 65.)

The master of the Koal Kraft had held that particular job for twelve years. (Tr. Dep. Com. p. 14.) Men working on the ship stayed in their jobs pretty steadily. (Tr. Dep. Com. p. 19.) Schumann was called every time the rest of the crew were called during the time he was employed. (Tr. Dep. Com. p. 21.) There was one man, a fireman, who was there eleven years (Tr. Dep. Com. pp. 19, 21) and another man who had been on the ship five or six years. (Tr. Dep. Com. p. 19.) Kerston, who had held the job to which Schumann succeeded when Kersten was promoted to be fireman, had been working on the ship for five years. (Tr. Dep. Com. pp. 21-22.) All of the members of the crew working on the ship were hired by the master. (Tr. Dep. Com. p. 16—Dist. Ct. p. 51.)

On the day when Schumann was lost, there were five men on the boat besides the master, consisting of an engineer, a fireman, and three deck hands, one of whom was Schumann. (Tr. Dep. Com. p. 15—Dist. Ct. pp. 48-49.) Schumann began work on the ship October 5, 1937 and was lost October 31, having worked during the intervening period of twenty-six days. (Tr. Dep. Com. p. 18—Dist. Ct. pp. 49, 57.) The master had a license to operate a ship in these navigable waters. (Tr. Dep. Com. p. 41.) The engineer was required to have a license. (Tr. Dist. Ct. p. 57.) The fireman was not required to have a license. (Tr. Dist. Ct. p. 57.) Deck hands signed no papers. In operating a local boat in the harbor or rivers they do not sign articles. (Tr. Dep. Com. p. 18.) Crews of ships sailing the Great Lakes operating between different ports on different lakes (not confined to waters of adjoining states) do sign articles. (Tr. Dep. Com. p. 18.) (See law applicable, as set out in the brief in support of this petition.) Had

not Schumann or someone in his place been included in the crew as one of the three seamen required, the Koal Kraft might not lawfully have left the dock with coal for delivery to its customer's ship. (Tr. Dep. Com. pp. 41-42—Dist. Ct. p. 54.) There was never a time when the Koal Kraft operated with less than three deck hands or laborers on board. (Tr. Dist. Ct. p. 53.)

Schumann was hired and paid as a deck hand as a member of the crew of the Koal Kraft. (Tr. Dep. Com. p. 16.) He was doing labor work on the ship and was known as a deck hand. (Tr. Dep. Com. pp. 28-29, 34.) Such men are classified as seamen right away upon employment. (Tr. Dist. Ct. p. 51.) There are two classes of seamen on a vessel, ordinary and first class seamen (Tr. Dist. Ct. 50), and Schumann was an ordinary seaman employed to do deck work. Laborers on vessels are called ordinary seamen. Ships do not have laborers besides such ordinary seamen. (Tr. Dist. Ct. pp. 50-51.) The words seamen and deck hand are synonomous (Tr. Dist. Ct. p. 52), all decks hands are ordinary seamen. (Tr. Dist. Ct. p. 52.)

Schumann's work consisted in part of handling the ship's lines, both in mooring and in casting off. (Tr. Dep. Com. pp. 16, 17, 32—Dist. Ct. pp. 49, 55, 58.) Throwing a heaving line is an act of seamanship which the other men teach a new man. (Tr. Dep. Com. p. 21.) Schumann assisted the fireman in operating a steam winch thru which ran the mooring lines. (Tr. Dep. Com. pp. 17, 35—Dist. Ct. p. 57.) He scrubbed, painted and otherwise cleaned the deck and other parts of the vessel. (Tr. Dep. Com. pp. 18, 33, 35, 37-38, 40—Dist. Ct. pp. 51, 55, 58.) He also cleaned up the deck removing loose coal. (Tr. Dep. Com. p. 33—Dist. Ct. pp. 55, 58.)

One of Schumann's duties was to watch the conveyor mechanism, and with a long stick or prod help keep the

coal moving along the conveyor. (Tr. Dep. Com. pp. 20, 31, 35, 36, 38, 40—Dist. Ct. pp. 50, 52, 55, 56, 58.) The duties of a deck hand on a ship of this sort are just general labor, keeping it clean, handling the lines, painting or whatever he is asked to do. (Tr. Dep. Com. pp. 18, 27.) Schumann did no work except on the ship. (Tr. Dep. Com. pp. 21, 28.) Practically all Schumann's work was done on the ship. (Tr. Dist. Ct. p. 49.) He did no work on the dock with respect to handling coal. (Tr. Dist. Ct. p. 49.) When handling the lines of a ship it was done both on the ship and on the dock. (Tr. Dep. Com. pp. 16, 22—Dist. Ct. pp. 49, 55, 56, 58.)

In most cases the ship was in transit about forty-five minutes between the dock where it received its coal and the vessel which it coaled. (Tr. Dist. Ct. p. 56.) It took about twenty minutes to transfer the coal to the ship to which it was going, depending upon the amount of coal ordered. (Tr. Dist. Ct. p. 56.) Schumann had nothing to do while the ship was in transit until he reached the ship to be coaled (Tr. Dep. Com. pp. 21, 38—Dist. Ct. p. 53), except for emergency work in case of a breakdown. (Tr. Dep. Com. pp. 38, 39.) He was a part of the movement of the ship. (Tr. Dep. Com. p. 33.) The usual procedure on reaching the ship to be coaled was to tie up alongside first. (Tr. Dist. Ct. p. 57.) This would take about five minutes. (Tr. Dist. Ct. p. 57.)

Schumann was not furnished sleeping quarters on the vessel (Tr. Dep. Com. p. 17—Dist. Ct. p. 49) nor was he furnished with food. (Tr. Dist. Ct. p. 49.) He lived in his own home. (Tr. Dep. Com. pp. 25-26.) He came on duty either upon call by telephone or at a time of which he was previously notified. (Tr. Dep. Com. pp. 20-21—Dist. Ct. p. 49.) This was the course with reference to all of the crew. (Tr. Dep. Com. p. 21—Dist. Ct. p. 49.) He

was paid only for the time he was actually engaged in work and was not paid while at home awaiting call. (Tr. Dist. Ct. p. 53.)

(3) The result of the hearing before the Deputy Commissioner was a finding that Schumann was not a member of the crew and was under the Compensation Act. (Tr. pp. 43-44.) On the trial of the case before the District Court, petitioners not only produced Exhibit B a transcript of the hearings had before the Deputy Commissioner (Tr. pp. 8-42), but also produced evidence to sustain their bill of complaint. (Tr. pp. 47-62.) The evidence of witnesses before the District Court was substantially the same as that befor the Deputy Commissioner.

No objection was made by the attorneys for the claimant at the trial before the District Court that the case could be tried only upon the record made before the Deputy Commissioner.

The District Court held as a conclusion of law that the ship was permitted to operate not to exceed 12 hours out of any 24 with a crew consisting of the persons named in the certificate (Tr. p. 69); that the petitioner, South Chicago Coal & Dock Company, was not liable for compensation (Tr. p. 69) and that a member of a crew of a vessel is not, nor is the owner of such vessel, subject to the jurisdiction of the Deputy Commissioner justifying any award of compensation for the death of a deck hand, a member of the crew, and that no jurisdiction existed in the Deputy Commissioner to make any award of compensation for the death of Schumann. (Tr. p. 69.)

The District Court also made findings of fact, that Schumann came to his death by drowning in the Calumet River while working on the vessel in question (Tr. p. 70); that his drowning occurred by reason of being lost from that vessel while it was navigating the Calumet Harbor and

River, navigable waters of the United States (Tr. p. 70); that Schumann's duties were incident to fueling vessels, in which trade the vessel Koal Kraft was at that time engaged (Tr. p. 70); that at the time of Schumann's drowning, the Koal Kraft was being navigated in the Calumet River between 95th Street and the Calumet River, and another vessel, the Ashley, lying at 104th Street and the Calumet River (Tr. p. 70); that Schumann was lost from the Koal Kraft after it had passed 95th Street and before it reached the Ashley (Tr. p. 70); that Schumann at the time of being lost was a seaman employed as a deck hand (Tr. p. 70) and was a member of the crew (Tr. p. 71); that on the day in question the Koal Kraft was being operated in accordance with the limitations of its certificate, being then engaged in harbor navigation with a crew and ship's papers (Tr. p. 71); and that Schumann was not within the coverage of the Compensation Act. (Tr. p. 71.)

As a result of the conclusion of law and findings of fact the District Court made permanent and perpetual the preliminary injunction or injunctional order theretofore issued; decreed that payments already made to Schumann's widow should not be recovered but that petitioners should not be required to make further payments pending an appeal. The award of compensation was vacated and set aside and the defendants were permanently restrained and enjoined from attempting to enforce payments under the award. (Tr. p. 72.)

(4) The Circuit Court of Appeals for the Seventh Circuit reversed the decree of the District Court upon the following grounds:

That the status of Schumann as a seaman or as a longshoreman was not a jurisdictional, fundamental fact entitling the District Court to consider and determine it but the finding of the Deputy Commissioner was binding upon the court; that a liberal construction of the Compensation

Act was proper not only as to matters relating to a claim but also as to the applicability of the Compensation Act;

That the exception contained in Section 3 with respect to non-applicability to a master or member of a crew stood in the same position as other provisions of Section 3 making compensation not payable because of drunkenness or suicide;

Gave no consideration to the provisions of Section 2 of the Compensation Act defining an employee; reviewed the evidence taken before the Deputy Commissioner and from that evidence reached the conclusion that the Deputy Commissioner's decision that Schumann was not a member of the crew and hence not excluded from the Act was a correct decision;

That the result of the case would be the same whether or not the District Court was entitled independently to pass upon the question of Schumann's being a member of the crew;

That even though a trial *de novo* was had the undisputed facts showed that Schumann had a non-seaman status; that the word "crew" as used in the certificate of inspection had a different meaning from the same word used in the statutory exception because of the purely incidental relation which the seaman's duties bore to navigation and the fact that his principal duties were those of an ordinary laborer who happened to be working on shipboard. (See Opinion of C. C. A., Tr. pp. 84-92.) This petition is presented August 4, 1939.

Jurisdiction.

Petitioners invoke jurisdiction under Section 240 of Judicial Code as amended, that is, under Act of February 13, 1925, Chapter 229, 43 Stat. 936-938, amending Section 240 of Judicial Code, and under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, Chapter 509, 44 Stat. 1424-1446, Sections 901-950, Title 33, pages

114-167, Pocket Supplement, and particularly under Section 21 of said Act, being Section 921 of said Title 33.

The judgment of the Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on May 11, 1939, and a petition for rehearing was denied on June 6, 1939. This petition and brief are presented August 4, 1939.

Questions Presented on This Petition.

The questions presented upon this petition involve a construction of the Longshoremen's and Harbor Workers' Compensation Act and are as follows:

(1) Does the Compensation Act in question exclude from jurisdiction of the Deputy Commissioner power to make a compensation award, respecting an ordinary seaman or deck hand in working upon a vessel operating in navigable waters of the United States, and is by legal requirement and as a matter of fact a member of the crew of such vessel?

(2) Is such question so fundamentally jurisdictional that the District Court may independently determine from the evidence whether such seaman or deck hand was a member of the crew and thus excluded from the provisions of the Compensation Act?

(3) Is applicability of the Compensation Act, which excludes members of a crew from the application of the Act, and determination of power of the Deputy Commissioner to make an award obtained by considering only Section 3(a) of the Act or should this question be measured also by Section 2 of said Act.

(4) Does a proper construction of the Compensation Act to determine jurisdiction of the Deputy Commissioner and the applicability of the Compensation Act require consideration not only of the fact that the deceased was an employee but also *whether he was an employee of the kind and description covered by the provisions of the Act?*

REASONS RELIED UPON FOR GRANTING THE WRIT.

The reasons for which these petitioners ask that a writ of certiorari be issued are as follows:

(1) The Circuit Court of Appeals for the Seventh Circuit failed to follow the decision of this court in *Crowell* v. *Benson*, 285 U. S. 22-95, 78 Law Ed. 598-637, and has decided this case in conflict with the applicable decision in that case in that the Circuit Court of Appeals has taken that decision of this court to mean that the only jurisdictional facts are (a) work being done upon navigable waters of the United States within the maritime jurisdiction of the United States, and (b) existence of an employer-employee relationship between the claimant and the employer. This is too limited because *Crowell* v. *Benson, supra*, decided as to the point (b) above referred to that not only must the employer-employee relationship exist but that *it must relate to an employee within its Act, that is, the nature of the employee's duties* (*i. e.*, that he is not a member of the crew of a vessel) *must be such as to bring him within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.*

(2) The Circuit Court of Appeals for the Seventh Circuit has decided this case in conflict with the decision of this Court in *Ellis* v. *United States*, 206 U. S. 246, 51 Law. Ed. 1047, where a distinction was made between "mechanics and laborers" and all classes of seamen including deck hands.

(3) The Circuit Court of Appeals for the Seventh Circuit rendered its decision in conflict with the decision of another Circuit Court of Appeals on the same matter, that is to say, in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Maryland Casualty Company* v. *Lawson, Deputy Commissioner, et al.*, 94 Fed. (2d) 190.

(4) The Circuit Court of Appeals for the Seventh Circuit rendered its decision also in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit on the same matter in the case of *Kibadeaux* v. *Standard Dredging Company*, 81 Fed. (2d) 670 (afterwards affirmed by this court in *Standard Dredging Company* v. *Kibadeaux*, 299 U. S. 549).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 6808, South Chicago Coal & Dock Company and London Guarantee & Accident Company, Ltd. *vs.* Harry W. Bassett, Deputy Commissioner of United States Employees' Compensation Commission, 10th Compensation District, and that the said judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

SOUTH CHICAGO COAL & DOCK COMPANY,
LONDON GUARANTEE & ACCIDENT COMPANY, LTD.,
Petitioners.

By Robert J. Folonie
ROBERT J. FOLONIE,

Hayes McKinney
HAYES MCKINNEY,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction.

We have set out in our petition for allowance of the writ of certiorari the basis of jurisdiction of this court and refer to that portion of the petition and incorporate it herein without repetition.

Statement.

The foregoing petition contains a summary of the material facts and reference thereto is hereby made and such statement is incorporated herein. Such statement consists of a condensed narrative account of the facts of the situation with substantiating references to the pages of the transcript of the record.

Specifications of Error.

The Circuit Court of Appeals for the Seventh Circuit erred:

(1) In reversing the decree of the District Court;

(2) In not affirming the decree of the District Court;

(3) In directing the dismissal of the bill for injunction filed by these petitioners;

(4) In holding that the Deputy Commissioner had jurisdiction to make an award for the death of John Schumann;

(5) In holding that John Schumann was not a member of the crew of the vessel Koal Kraft;

(6) In holding that the District Court was not entitled to hear the case *de novo;*

(7) In sustaining the contentions of the respondent, respecting trial *de novo* in the District Court, when no objection to such trial *de novo* was there made;

(8) In holding that the crew-membership status of Schumann was not jurisdictional in character;

(9) In holding that the crew-membership status of Schumann was not a jurisdictional question of employer-employee relationship under the Act.

(10) In holding that the disputed question whether Schumann was a member of the crew did not present a jurisdictional question of employer-employee relationship to be determined by the District Court.

Summary of Argument.

1. The Longshoremen's and Harbor Workers' Compensation Act applies only where (a) the claimant's work was within the maritime jurisdiction of the United States, (b) an employer-employee relationship, as defined and limited in the Act, existed between the claimant and the persons sought to be held. *Crowell* v. *Benson*, 285 U. S. 22.

2. The Longshoremen's and Harbor Workers' Compensation Act clearly excludes a member of the crew of a vessel from the operative effect of the Act.

44 Stat. 1424, Sec. 2. U. S. C. A. Pocket Supplement, Sec. 902(3) Ch. 33, p. 115.

3. Whether or not John Schumann was within the applicable provisions of the Compensation Act presented a question of law, which, together with the facts by which the question is resolved, are for the independent decision of the courts, and not finally determinable by administrative bodies.

Crowell v. *Benson*, 285 U. S. 22, l. c. 46, 62.

Maryland Casualty Co. v. *Lawson, Deputy, etc.*, 94 Fed. (2d) 190.

4. In this case Schumann was a "member of the crew", that is, was an ordinary seaman integrated into the ship's complement by law and in fact.

The distinction between a "seaman" or "member of he crew" and an ordinary laborer ashore does not lie n the different nature, if any, of the work done but in the tatus of the seaman as forwarding the enterprise of the hip subject to control of the master, namely, such employee is a part of the ship's complement.

A sound hull, fit propulsive power and a crew as prescribed by law are all parts of a seaworthy ship.

Maryland Casualty Co. v. *Lawson, Deputy, etc.*, 94 Fed. (2d) 190 (U. S. C. C. A. 5th Cir.).

Standard Dredging Co. v. *Kibadeaux*, 81 Fed. (2d) 670.

Ellis v. *U. S.*, 206 U. S. 246, l. c. 260.

5. The respondent waived any question as to a trial *de novo* in the District Court.

3 Corpus Jur., p. 718, Sec. 618.

4 Corp. Jur., Secundum, p. 465, Sec. 241(a).

ARGUMENT.

I.

The Longshoremen's and Harbor Workers' Compensation Act applies only where:

(a) the work being done by the claimant falls within the maritime jurisdiction of the United States;

(b) the employer-employee relationship prescribed by the Act existed between the claimant and the persons sought to be held, namely, the claimant was an employee within definitions of the Compensation Act (i. e., a person other than member of the crew).

The leading and controlling case on this head is that of *Crowell* v. *Benson*, 285 U. S. 22-95, 78 L. Ed. 598-637, where this court very pointedly stated the distinction:

"Apart from cases involving constitutional rights

to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to employees *within the purview of the Act*, the findings of the Deputy Commissioner, supported by evidence and within the scope of his authority, shall be final." (p. 46.) (Italics ours.)

"The Congress has not expressly provided that the determinations by the Deputy Commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations by the Deputy Commissioner is predicated upon the provision (Section 19(a)) that he 'shall have full power and authority to hear and determine all questions in respect of such claim' but 'such claim' is the claim for compensation under the Act and by its explicit provisions is that of an 'employee', *as defined in the Act*, against his employer'." (p. 62.) (Italics ours.)

The decision in *Crowell* v. *Benson* makes it a jurisdictional prerequisite to attachment of jurisdiction by the Deputy Commissioner that such worker was an employee of the persons sought to be held, but was also *an employee of the class included in the Compensation Act* as the Act defines that class, *i. e.*, maritime employees who are not members of the crew of a vessel.

II.

The Longshoremen's and Harbor Workers' Compensation Act embraces a limited class of employees engaged in work upon navigable waters of the United States within its maritime jurisdiction, and prescribes that masters of ships and members of the crew of vessels are excluded. (44 Stat. 1424.)

Section 2 of the Act, which contains definitions of the expressions used in the Act, is as follows:

Section 2, subsection 3:

"(3) The term 'employee' does not include a mas-

ter or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net." (Section 902(3), Chapter 33, page 116, Pocket Supplement, U. S. C. A.)

The foregoing provision sets forth conditions precedent which must be met before the Act is applicable to any case. Unless an "employee" is one responding to the definition of the foregoing subsection (3), the Act has no application even though the work, both of employer and employee, may relate to maritime employment upon navigable waters of the United States. This view of the situation was completely ignored by the Circuit Court of Appeals for the Seventh Circuit, which predicated its decision entirely upon Section 3 of the Act relating to coverage, which section for convenience is set out in full and is as follows:

"§ 903. Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, § 3, 44 Stat. 1426.)" (Section 903, Title 33, page 120, Pocket Supplement U. S. C. A.)

The language used in Sec. 3 (a) (1) is identical with that contained in Section 2 of Definitions. Here again, as with respect to Section 2, is found *a condition precedent,* namely

that the provisions for compensation shall not apply where the worker-claimant is a master of a ship or a member of the crew thereof. The question of applicability of the Act is a question of law, and while dependent upon a fact situation, namely, whether the claimant is the master of a vessel or is the member of the crew of a vessel, it still remains a question of law which must be decided by the courts.

The Circuit Court of Appeals in the case at bar, held that exclusion from the Act of "members of the crew" (Section 3, subsection a) is no more jurisdictional than suicide or drunkenness (Section 2, subsection b) in the presence of which one covered by the Act is barred from his compensation. The denial of compensation where the injury to a person within the Act was caused solely by drunkenness or suicide rests upon *a condition subsequent*, which relieves the *employer covered by the Act*, from liability to an *employee covered by the Act*, who by his own act of drunkenness or suicide, has deprived himself of the benefits of the Act.

In the case at bar the deceased was never under the Act. A *condition preccdent* to jurisdiction of the Deputy Commissioner is therefore lacking.

III.

Whether the Compensation Act was applicable, that is, whether an employee is under the Act, is a legal question such as referred to in Section 21(b) ("if not in accordance with law") and in Section 18 ("is in accordance with law").

Such questions and all facts from which such questions are resolved are for the courts, not for administrative bodies.

These provisions were doubtless incorporated into the Act in order to be sure that lack of judicial review upon

questions of law should not invalidate. In *Crowell* v. *Benson, supra,* the following pertinent language is found:

> "Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, *arising with respect to injuries to employees within the purview of the Act,* the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." (page 46.) (Italics ours.)
>
> "The finality of such determinations of the deputy commissioner is predicated primarily upon the provision (Sec. 19 (a)) that he 'shall have full power and authority * * * in respect of such claim'. But 'such claim' is the claim for compensation *under the Act* and by its explicit provisions is that of an *'employee' as defined in the Act,* against his 'employer'." (page 62.) (Italics ours.)

See also

Maryland Casualty Co. v. *Lawson, Deputy, etc.,* 94 Fed. (2d) 190 (C. C. A. 5th Cir.).

IV.

The facts here clearly show that Schumann was a "member of the crew", that is, was an "ordinary seaman" integrated into the ship's complement by law and in fact.

The Circuit Court of Appeals stressed the fact that Schumann did not live on the vessel, *that is,* did not sleep there, and was not furnished his meals and that honorable court laid emphasis that the deck hand performed in the main the work of a laborer.

Vessels engaged in harbor work are subject to the maritime jurisdiction relating to vessels operating on navigable waters of the United States. The laws of the United States recognize distinctions between vessels operating in harbors and those engaged in longer voyages:

(a) With respect to vessels navigating harbors and between adjoining states only, there is no requirement for shipping articles as required on vessels bound for foreign ports and from the Atlantic to the Pacific Ocean, or vice versa.

See R. S., Sec. 4511 (46 U. S. C. A. Sec. 564).

(b) Vessels in the coasting trade, though required to have shipping articles when bound from a port in one state to a port in another state specifically are exempt where the situation is that one of such ports is in "an adjoining state".

See R. S. Sec. 4520 (46 U. S. C. A. Sec. 574); *Thorson* v. *Peterson*, 9 Fed. 517.

In this case the vessel Koal Kraft was limited in its operations between Calumet Harbor and River in Illinois and the Indiana Harbor in the adjoining state of Indiana.

One engaged in work upon a harbor vessel is nevertheless a seaman and a member of the crew even though merely an ordinary seaman doing the most common and ordinary kind of laboring work.

Other requirements of United States law applicable to the Koal Kraft are those governing:

(a) Inspection;

See 48 Stat. 125, Chap. 61, Sec. 4399 (46 U. S. C. A. Sec. 361).

(b) Regulation of navigation;

See 34 Stat. 68, Chap. 955, Sec. 4400 (46 U. S. C. A. Sec. 362).

(c) Issuance of inspection certificates by such inspectors, in the absence of which vessels are not permitted to enter into navigation;

See 33 Stat. 1023, Chap. 1454, Sec. 4417 (46 U. S. C. A. Sec. 391—Hull Inspection).

See also 48 Stat. 125, Chap. 61, Sec. 4418 (46 U. S. C. A. Sec. 392—Boiler Inspection).

See 38 Stat. 1216, Chap. 184, Sec. 4421 (46 U. S. C. A. Sec. 399).

(d) Designation of the complement of licensed officers and crew and certificates of inspectors. A vessel may not be navigated unless she complies with these directions.

See 40 Stat. 548, Chap. 72, Sec. 4463 (46 U. S. C. A. Sec. 222).

The rules and regulations of the Board of Supervising Inspectors for the Great Lakes have the force and effect of an Act of Congress.

See *Leathem Smith-Putnam Navigation Company, et al.* v. *National Union Fire Insurance Company, et al.*, 96 Fed. (2d) 923-927.

In the light of the foregoing requirements, the certificate which enabled the vessel Koal Kraft to operate upon the navigable waters of the United States becomes important, for the certificate in question required this particular vessel to have "1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman." (Tr. p. 65.)

A "seaman" is a member of the crew of a vessel. See Sec. 713, Title 46 U. S. C. A.

Schumann was one of these required "seamen" within the meaning of the statute and of the certificate of the government inspectors, and thus essentially integrated into the crew as a member thereof to such an extent that had not he or someone in his place been employed on the

Koal Kraft it might not lawfully have left its dock. (Tr. pp. 41-42; 54.)

A case which seems to us conclusive upon the present question and which takes the view of *Crowell* v. *Benson*, 285 U. S. 22, is *Maryland Casualty Co., et al.* v. *Lawson, Deputy Commissioner*, 94 Fed. (2d) 190. (See comparatively case in the same volume at page 193, decided by the Circuit Court of Appeals for the Fifth Circuit.) It presents clearly a conflict with the decision in the present case and thus supports our contention that a writ of certiorari should be allowed.

In that case, Burrows, employee, worked as a deck hand, or common laborer, upon a scow which was loaded by a large seagoing dredge operating in the harbor of Miami, Florida. The scow when loaded was towed out to sea by a seagoing tug and there its contents were dumped into the sea. Burrows was lost from the scow and drowned while the scow was out at sea dumping its accumulation of harbor dredgings. The court says (page 192):

> "A single question, common to both appeals, needs decision, to wit, *Was Burrows an employee within the act, so that the Deputy Commissioner had jurisdiction? This is a question on which his fact findings are not conclusive. Crowell* v. *Benson*, 285 U. S. 22, 24." (Italics ours.)

Burrows was drowned while unloading a scow about three miles off the harbor at Miami.

The court further says (page 192):

> "We attempt no definition of the crew of a vessel. Who are included was discussed recently, from different standpoints, in *DeWald* v. *B. & O. R. Co.*, 4 Cir. 71 F. 2d 810 and *Wandtke* v. *Anderson*, 9 Cir., 74 F. 2d 381. There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise and to protect her in emer-

gency, and a right to look to her and her earnings for wages. If she has a master, there is subjection to his commands. The nature of the work done is not determinative. Engineers and cooks as well as sailors are included. Longshoremen who load and unload a vessel under temporary local employment do not become members of the crew, nor do mechanics who similarly come aboard her to repair or clean or paint her; nor do those permanently employed upon her cease to be members of the crew because they are put at the same sort of work."

The court says the evidence is without contradiction that the dredge Corozal

"* * * was in command of a licensed master and was clearly a vessel with a crew within the meaning of the act, under our holding in *Kibadeaux* v. *Standard Dredging Co.*, 5 Cir., 81 F. 2d 670; *Standard Dredging Co.* v. *Kibadeaux*, 299 U. S. 549." (P. 192.)

Burrows worked on the scow. He was hired by the master of the dredge, on which he was fed and quartered. He signed no seaman's articles, and was not shown to be an experienced sailor.

"* * * But he and another were put aboard this scow, and remained there during their daily shifts of eight hours handling her lines, doing what was necessary to her navigation, and attending to dumping and cleaning her at sea.

While alongside the dredge and while aboard the dredge, they took orders from the master of the dredge. * * * He was employed under the title 'deckhand', and the evidence is that men at his work were always so called." (P. 193.)

The court held that:

"* * * The Deputy Commissioner was without jurisdiction. The judgments are reversed and the causes remanded, with directions to set aside his award." (P. 193.)

That Schumann was not a mere casual temporary employee was shown by the fact that although he had worked at this job only twenty-six days he was as much a part of

the entire enterprise of operating the ship Koal Kraft as the captain of twelve years experience with the ship or other workers who had taken part in its operation for long periods of time.

The differences in the facts of that case and those of the instant case are of no consequence. The scow on which Burrows was working did not operate under its own power, while the Koal Kraft did, but both were operating on the navigable waters of the United States, within the maritime jurisdiction. Burrows, it is true, was fed and quartered aboard the dredge which was used to load the scow upon which Burrows actually worked, but that was a mere difference in the terms of compensation under the employment contract.

See also *Kibadeaux* v. *Standard Dredging Co.*, 81 Fed. (2d) 670 (affirmed by Supreme Court of United States, *Standard Dredging Co.* v. *Kibadeaux*, 299 U. S. 549). The opinion is by the Circuit Court of Appeals, Fifth Circuit—Feb. 3, 1936. The facts in that case (see p. 673) do not differ in any important particular from those in the case at bar. It involved a harbor vessel without motive power.

In that case the deceased deck hand worked eight hour shifts, but at his option could go ashore after working hours to spend the night.

In the case cited Kibadeaux was "employed as a deck hand, with duties as a general helper."

The court held Kibadeaux was a seaman, and stresses the fact that he was the type of person who would have a maritime lien for his wages (p. 674).

The court, quoting from *Ellis* v. *United States*, 206 U. S. 246, says that all dredge hands are seamen within the

definition of an earlier statute of the United States, because they are "called upon for more or less of the services required of ordinary seamen" (p. 260). The fact that the work is all performed on board ship is of importance, and the court says:

> "Whatever the nature of their work, it is incident to their employment on the dredges and scows, as in the case if an engineer or coal shoveler on board ship." (P. 260.)

A libel to recover damages independent of the Longshoremen's Act is sustained, on the ground that the Longshoremen's Act does not apply.

The decision of the Circuit Court of Appeals in this case was predicated largely upon the fact that the work being done by Schumann was in the main unskilled laborer's work on shipboard. The controlling test is not to the nature of the work but the test is whether or not the injured person was a part of the ship's complement. The work he happens to perform is incidental to his position as one of the essential ingredients of a seaworthy ship.

Ellis v. *U. S.*, 206 U. S. 246, l. c. 260.

V.

The respondent waived any question as to a trial de novo in the District Court.

This case came on for trial in the District Court upon the petitioners' bill for an injunction filed pursuant to Section 21 of the Compensation Act, and the petitioners as plaintiffs and moving parties in the cause proceeded in regular course to produce evidence in support of their bill of complaint. No objection to the trial *de novo* was made in the District Court. Accordingly, all questions as

to the propriety of a trial *de novo* in the District Court were waived by the respondent.

See 3 Corp. Jur. p. 718, Sec. 618.

See also 4 Corp. Jur. Secundum, p. 465, Sec. 241(a).

The principal difference between the evidence before the Deputy Commissioner and that before the District Court consisted of the production before the court (Tr. pp. 65-68) of the certificate of inspection fixing the personnel of the operating crew of the Koal Kraft whereas before the Deputy its substance was testified to. (Tr. p. 36.) The evidence as to inspection was produced under a specific written stipulation that the certificate in question was a part of the evidence heard by the District Court. (Tr. pp. 77-78.)

The District Court made specific findings of fact (Tr. pp. 70-71) and conclusions of law (Tr. p. 68) which were ignored by the Court of Appeals upon the apparent premise that the District Court was concluded by the findings of the Deputy as to the facts and that the finding of the Depufy that Schumann was not a member of the crew precluded any inquiry into the fact and involved no question of law.

Conclusion.

From the foregoing analysis of the facts and of the law applicable thereto, we respectfully urge that the petition for certiorari should be allowed, so that when allowed the judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed and the judgment of the District Court for the Northern District of Illinois may be affirmed.

Respectfully submitted,

ROBERT J. FOLONIE,
HAYES MCKINNEY,
Counsel for Petitioners.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

HAYES MCKINNEY, being duly sworn, deposes and says that this petition for a writ of certiorari is presented in good faith, that he believes it to be sound in law and in fact, and that it is not presented for the purposes of delay.

Hayes McKinney

Subscribed and sworn to before me this 2nd day of August, 1939.

Lillian Preis

Notary Public.

My commission expires April 16, 1943